ABSTRACTS OF RECENT DECISIONS.

SUPREME COURT OF THE UNITED STATES.[1]

SUPREME COURT OF ARKANSAS.[2]

SUPREME COURT OF KANSAS.[3]

SUPREME JUDICIAL COURT OF MAINE.[4]

SUPREME JUDICIAL COURT OF MASSACHUSETTS.[5]

SUPREME COURT OF NEW JERSEY.[6]

ACTION. See *Check.*

Assumpsit—Money had and received—Privity of Contract.—Privity of contract, express or implied, is necessary to the maintenance of an action for money had and received: *Nolan* v. *Manton*, 17 Vroom.

A widow received from a savings bank money deposited by her husband in his own name. Letters of administration on the husband's estate were afterwards obtained by another person. In a suit against her by the administrator for money had and received, *held*, 1st. That if the defendant received the money on an undertaking to pay it to an administrator when one should be appointed, or to hold it for the benefit of the husband's estate, the trust would enure to the benefit of the administrator when letters were taken out, and thereupon a contract to pay him would be implied, on which he might sue. 2d. That if the defendant claimed the money as her own money—demanded it of the bank as her own—and the officers of the bank recognising her as the right owner of the money, paid it to her as money belonging to her in her own right, and she received it as such without any undertaking to hold it for another, the action could not be maintained for the want of privity of contract: *Id.*

Injunction Bond—Final Decree.—In a suit brought for a perpetual injunction a right of action does not accrue on an undertaking given on the issue of a temporary injunction or restraining order, until a final judgment in the suit in which it was issued is rendered, and a suit commenced on such undertaking before such judgment is prematurely brought and cannot be maintained: *Brown* v. *Galena Min. Co.*, 32 Kans.

A final judgment is one which finally decides and disposes of the whole merits of the case, and reserves no further question or direction for future or further action of the court. The voluntary dismissal by the plaintiff of the suit in which the injunction is issued is a final determination of that suit, and determines the right to sue on the undertaking

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[2] From B. D. Turner, Esq., Reporter; to appear in 43 Ark. Rep.

[3] From A. M. F. Randolph, Esq., Reporter; to appear in 32 Kans. Rep

[4] From J. W. Spaulding, Esq., Reporter; to appear in 76 Me. Rep.

[5] From John Lathrop, Esq., Reporter; to appear in 137 Mass. Rep.

[6] From G. D. W. Vroom, Esq., Reporter; to appear in 17 Vroom.

given on the issuing of a temporary injunction as effectually as a final judgment on a trial: *Id.*

APPORTIONMENT.

Interest on Notes—Trust Estates.—Interest due on notes accrues from day to day, and when to be appropriated to income may be apportioned, and unlike an annuity or dividend, which can be credited to income when payable, it is, when received, to be credited to income for the time during which it accrued: *Veazie* v. *Forsaith*, 76 Me.

A part of a trust estate, created by a trust deed, consisted of notes due from an estate which was insolvent. Without going through a process of insolvency, after paying other debts against the estate in full, the remainder of the property, by the agreement of all the parties interested, was appropriated to the payment of these notes, and in consideration thereof the notes, both principal and interest, were discharged, though not paid in full. *Held*, the loss is to be borne *pro rata* by the principal and interest, and the interest less the loss thus ascertained, is to be credited to the income for the years in which it was earned, and the remainder to the principal, except that portion of the interest earned before the date of the trust deed, which is to be credited to the principal: *Id.*

ASSUMPSIT. See *Action.*

BANK. See *Check.*

BILLS AND NOTES.

Alteration of Note by Endorser by adding a Signature as Maker—Accompanying Mortgage.—The addition of the signature of a surety to a promissory note, without the consent of the maker, does not discharge him: *Mersman* v. *Werges*, S. C. U. S., Oct. Term 1884.

A mortgage executed by husband and wife of her land, for the accommodation of a partnership of which the husband is a member, and as security for the payment of a negotiable promissory note made by the husband to his partner and endorsed by the partner for the same purpose, and to which note the partner, before negotiating it, adds the wife's name as a maker, without the consent or knowledge of herself or her husband, is not thereby avoided as against one who, in ignorance of the note having been so altered, lends money to the partnership upon the security of the note and mortgage: *Id.*

Alteration—Avoidance.—The material alteration of a promissory note avoids the note as to the maker not consenting thereto, even in the hands of a *bona fide* holder: *Horn* v. *Newton City Bank*, 32 Kans.

If a promissory note be altered by substituting another payee for the original payee, with the knowledge and consent of one of the makers, but without the knowledge or consent of the other maker, such material alteration releases from all liability the maker not consenting: *Id.*

CERTIORARI. See *Corporation.*

CHECK.

Action against Bank.—The holder of a check on a bank cannot sue the bank for refusal to pay it on presentation, though the drawer have

sufficient on deposit to meet it: *Creveling* v. *Bloomsbury Nat. Bank*, 17 Vroom.

COMMON CARRIER.

Loss of Goods—Agreed Valuation—Damages.—Goods delivered to a common carrier under a bill of lading containing a stipulation that they were shipped at an agreed valuation of a certain sum, and that, if a loss occurred for which the carrier was responsible, the value of the goods at the time and place of shipment was to govern the settlement, "except the value of the articles has been agreed upon with the shipper." The carrier had no knowledge of the value of the goods except that furnished by the statement of the shipper, and the charge for transportation was based upon such valuation. The goods were lost by the negligence of the carrier's servants. *Held*, in an action for such loss, that the shipper was estopped to claim more than the agreed valuation of the goods: *Graves* v. *Lake Shore & Mich. Southern Railroad*, 137 Mass.

CONSTITUTIONAL LAW.

Acquisition of Homestead—Conspiracy to Prevent.—The exercise by a citizen of the United States of the right to make a homestead entry upon unoccupied public lands and perfect his right to the same, is the exercise of a right secured by the Constitution and laws of the United States within the meaning of sect. 5508 Rev. Stat. making amenable to penalty those conspiring to injure, oppose, &c., any citizen in the free exercise of such rights: *United States* v. *Waddell*, S. C. U. S., Oct. Term, 1884.

Regulation of Commerce—Tax on Oyster-Boats.—An act assessing a tax in proportion to tonnage on boats engaged in planting or taking oysters in certain localities is not repugnant to the Constitution of the United States, as an attempt to regulate commerce between the states: *Johnson* v. *Loper*, 17 Vroom.

The imposition of a license fee upon all boats engaged in planting or taking oysters in the said places, is not obnoxious to the requirement in the state constitution that property shall be assessed under general laws and by uniform rules, according to its true value: *Id.*

Citizenship of an Indian.—An Indian, born a member of one of the Indian tribes within the United States, which still exists and is recognised as a tribe by the government of the United States, who has voluntarily separated himself from his tribe, and taken up his residence among the white citizens of a state, but who has not been naturalized or taxed or recognised as a citizen, either by the United States or by the state, is not a citizen of the United States, within the meaning of the first section of the fourteenth article of amendment of the constitution: *Elk* v. *Wilkins*, S. C. U. S., Oct. Term, 1884.

Regulation of Commerce—Exclusive Power of Congress.—Under Art. 1, Sec. 8, of the Constitution of the United States, the power of Congress to regulate commerce among the states—inter-state commerce—which consists, among other things, in the transportation of goods from one state to another, is exclusive: *Hardy* v. *Atchison, Topeka and Santa Fe Railway Co.*, 32 Kan.

The fact that Congress has not seen fit to prescribe any specific rules to control or regulate the transportation of goods from a place in one state to a place in another—inter-state commerce—does not empower the states of the Union to regulate such commerce. Its inaction on the subject, when considered with reference to its other legislation, is equivalent to a declaration that inter-state commerce shall be free and untrammelled: *Id.*

Query: Has not Congress legislated upon inter-state commerce by the act of June 15, 1856, authorizing all railroad companies to transport passengers and freight from state to state, and empowering them to receive and accept compensation therefor? Rev. Stat. of U S., sect. 5258: *Id.*

CONTEMPT. See *Malicious Prosecution.*

What Constitutes.—To constitute a direct contempt of court, there must be some disobedience to its order, judgment or process, or some open or intended disrespect to the court or its officers in the presence of the court, or such conduct in or near the court as to interrupt or interfere with its proceedings, or with the administration of justice: *In re W. W. D. H.*, 32 Kan.

To constitute a constructive contempt of court, some act must be done, not in the presence of the court or judge, that tends to obstruct the administration of justice or bring the court or judge or the administration of justice into disrespect: *Id.*

D. executed his recognisance to appear in the District Court at a certain term and submit to a trial on a criminal charge pending against him in such court. He did not appear at such term, but absented himself from the county where the court was held. Proceedings were taken against him for a contempt, and he was convicted and imprisoned. *Held*, that the facts stated in the charge against him on which he was convicted, did not constitute a contempt for which he could be punished by fine or imprisonment: *Id.*

CONTRACT.

Sale—Damages to Personal Property—Rights of Special and General Owners to.—A mower company, the owner of a lot of mowing machines, consigned and forwarded them to D., by virtue of a contract under which D. was to pay the freight on them and sell them for a specified commission, and account to the company for them at a specified price. *Held*, 1st. This contract did not change the title in the machines. 2d. D. had such special property in the machines as to enable him to maintain an action against a carrier for a wrongful act to the property, in which he would recover, not only his own damages, but such as accrued to the company as general owners. 3d. A sale of the property after the damage had accrued would not transfer the claim for damages: *Boston and Maine Railroad Co.* v. *Warrior Mower Co.* 76 Me.

CORPORATION.

President—Power to confess Judgment—Receiver.—The president of a corporation has no power, by virtue of his office as president, to execute a bond and warrant of attorney for the entry of a judgment by confes-

sion against the corporation: *Stokes* v. *New Jersey Pottery Co.*, 16 Vroom.

The powers of the president of a corporation over its business and property are strictly the powers of an agent—powers delegated to him by the directors, who are the managers of the corporation and the persons in whom the control of its business and property is vested: *Id.*

The president of a corporation, organized for business purposes, is its chief executive officer, and in virtue of his office has authority to perform all acts of an ordinary nature which, by usage or necessity, are incident to his office, and may bind the corporation by contracts in the usual course of business. His authority to act for the corporation may also be enlarged beyond those powers which are inherent in his office, but those are cases where the agency of the officer has arisen from the assent of the directors, from their consent and acquiescence in permitting him to assume the direction and control of its business, and are instances of the application of the principle that a principal will be liable for the acts of his agent within the apparent authority conferred upon him: *Id.*

That the president of a corporation is the owner of nearly all its capital stock, and is its superintendent and treasurer and the active manager of its affairs, and was accustomed to borrow money for the company's use, will give him no power to encumber its property by a mortgage or judgment confessed for money borrowed: *Id.*

The corporation having become insolvent, its receiver, as the representative of creditors, has the capacity to take the objection that a judgment against the corporation by confession was not obtained in such a manner as to be binding upon the corporation: *Id.*

Existence questioned Collaterally—Injunction.—Although the existence of corporations voluntarily organized under general statutes, cannot be questioned collaterally, yet if they have resulted from fraudulent combinations of individuals to procure powers, under circumstances and for purposes not within the scope and purpose of legislative intent, and under shelter of their charter are about to exercise powers oppressive to an individual, they may be restrained by private suit of those injured or about to be: *Neimeyer* v. *Little Rock Junc. Railroad*, 43 Ark.

When the proposed action of a railroad company in taking land for its track is unauthorized, chancery may restrain it by an injunction: *Id.*

Gas Companies—Certiorari—Proceedings to Invalidate Grants of Similar Rights to Rival Companies.—Gas companies having the right to use the streets of a city for their gas pipes, may, by *certiorari*, challenge the legality of municipal proceedings designed to give similar rights to rival companies, and individuals owning the soil of a street may also question the claim of a gas company to lay its pipes therein: *People's Gas-light Co.*, v. *Jersey City*, 17 Vroom.

Existence—Collateral Suit.—If the charter of a corporation provides that the corporation shall cease to exist if a certain thing is not done in a certain time, the question whether the corporation has ceased to exist can be judicially determined only in a suit to which the Commonwealth is a party: *Briggs* v. *Cape Cod Ship Canal Co.*, 137 Mass.

COURT.

Orphans' Court—Decree of—Not Questioned Collaterally.—A

decree of the Orphans' Court, granting letters of administration, founded on a petition and proofs, presenting a colorable case, of the decease of the alleged intestate, and as to his residence, cannot be called in question in a collateral proceeding: *Plume* v. *Howard Sav. Ins.*, 17 Vroom.

Criminal Law. See *Witness.*

Carrying Weapon.—On the trial of a defendant for carrying a pistol as a weapon, it is not necessary to prove that the pistol was loaded: *State* v. *Wardlaw*, 43 Ark.

Former Conviction, when a Defence.—A former conviction is a bar to any offence of which the defendant might have been convicted under the indictment and proof in the first case. And so when a defendant has been convicted under a valid indictment for unlawfully selling liquor, and under proof of several different sales in a given time, and the state made no election as to which it would prosecute, the conviction is a bar to a subsequent indictment for any sale to the same party within the same time: *State* v. *Nunnelly*, 43 Ark.

Husband and Wife—Coercion.—The laws of Kansas do not presume that a wife who unites with her husband in the commission of a crime acts under his coercion. On the contrary, the laws of Kansas presume that all persons of mature age and sound mind act upon their own volition and are responsible for their acts. The question whether a wife acted under the coercion of her husband or not is a question of fact, which should in all cases be left to the jury. *State of Kansas* v. *Hendricks*, 32 Kan.

Domicile.

Student—Residence—Presumption.—Bodily presence and an intention by the student to remain in such a place only because a student, or only as long as a student, do not confer domicile; the intention must be more than to make the place a temporary home, or student's home merely; it must be an intention to establish an actual, real and permanent home in such a place; to remain there for an indefinite period, regardless of the duration of the college course: *Sanders* v. *Getchell*, 76 Me.

The presumption is against a student's right to vote in such place, if he comes to college from out of town. His calling the place his home, or believing it to be his home, does not legally make it such. It is not his view of the facts that governs; the facts themselves govern the question. Each case must depend upon its peculiar facts: *Id.*

Easement.

Proof of.—To an action for maintaining an artificial structure on the defendant's land in such a manner that rain water which fell on the roof of the structure was thrown on the plaintiff's land, the defendant set up a right by prescription to have the water so flow: *Held*, that the burden of proof was on the defendant to show an open, continuous, and adverse use of such servitude; and that the burden was not sustained by proof that the artificial structure had been in the same condition for more than twenty years: *Hooten* v. *Barnard*, 137 Mass.

If the plaintiff in an action proves an invasion of his rights by the defendant, he is entitled to recover at least nominal damages: *Id.*

ELECTIONS. See *Mandamus.*

EVIDENCE. See *Expert.*

Law of Other State—Judgment of Justice.—Matters of practice in another state may be proved by the testimony of lawyers skilled in the laws, usages and practice of the state: *Blackwell* v. *Glass*, 43 Ark.

A justice's judgment from another state can not be proved by a certified copy of his minutes like a certified transcript from a court of record. The original minutes must be produced, or a copy verified by the testimony of witnesses who have compared it with the original: *Id.*

EXECUTORS AND ADMINISTRATORS.

Opening Account.—If the administrator of the estate of a deceased partner in a firm has made a settlement with the surviving partners, and his account, including the amount received from such settlement, has been allowed by the Probate Court, that court has no jurisdiction to open the account, upon the petition of the successor of such administrator, to which the surviving partners only are made respondents, on the ground that the settlement was induced by the fraud of the surviving partners: *Blake* v. *Ward*, 137 Mass.

EXPERT.

Opinions of Non-professional Witness.—Non-professional witnesses, having sufficient opportunities of observing a person alleged to be insane, or *non compos mentis*, may give their opinions as to his sanity or mental condition as the result of their personal observation, after first stating the facts which they observed: *Boughman* v. *Boughman*, 32 Kan.

HUSBAND AND WIFE. See *Criminal Law.*

INJUNCTION. See *Corporation.*

Issued by Court without Jurisdiction.—A writ of injunction issued in a matter over which the court has no jurisdiction is void, and no one is bound to obey it: *Willeford* v. *State*, 43 Ark.

JUDGMENT. See *Corporation; Evidence.*

LIMITATIONS, STATUTE OF.

Acknowledgment—Qualified Promise—Payment of by One Joint Promisee.—From an unqualified acknowledgment of a subsisting debt the law will imply a promise which will obviate the bar of the statute; but if there be anything in the admission to repel the inference of a promise to pay, no promise will be implied, and the acknowledgment will not enable the plaintiff to recover; and if the acknowledgment be coupled with a promise which is qualified or conditional, neither the acknowledgment nor the promise will be available unless the condition has been performed, or the event happened, by which the promise is qualified: *Parker* v. *Butterworth*, 17 Vroom.

Defendant, a joint maker of a promissory note, in a letter written to the plaintiff, admitted that he signed the note as surety: "It would be impossible for me to pay the note at this time; therefore I shall be a thousand times obliged to thee if thee will allow it to rest until John" (the other maker) "or I, or both, are in better condition to liquidate

it:" *Held*, to be a qualified promise by the defendant to pay when his circumstances had so improved that he had the ability to pay, and that the plaintiff could not make the promise available without affirmative proof of the substantial fulfilment of the condition: *Id.*

A payment on account by one joint promissor will not remove the bar of the statute of limitations as against a co-promissor in whose favor the statute had attached when the payment was made: *Id.*

Whitcomb v. *Whiting* approved and explained. *Channell* v. *Ditchburn*, 5 M. & W. 494, and *Goddard* v. *Ingram*, Q. B. 839, disapproved: *Id.*

Malicious Prosecution.

Advice of Counsel.—In an action for malicious prosecution where the defendant claims that he acted under the advice of counsel, it is for the jury to say whether the fact, that the attorney and counsellor whose advice was sought was the attorney in a civil suit to recover of this plaintiff the sum alleged in the criminal proceeding to have been embezzled, made the attorney an improper person to consult—whether he was carrying on the suit under such circumstances and with such motives as prejudiced him and rendered him unfit to give fair and impartial advice in the premises: *Watt* v. *Corey*, 76 Me.

Action for Arrest on Civil Process—Contempt.—An action for damages does not lie against a plaintiff for the arrest upon civil process of a defendant, who was at the time privileged from arrest as a witness (without a writ of protection) returning home from court. The remedy consists in an application for a discharge from arrest; the most expeditious mode being by summary motion to the court or some judge thereof: *Smith* v. *Jones*, 76 Me.

A person ordering an arrest of a witness upon civil process, may be punished for contempt of court for interference with its business: *Id.*

Mortgage. See *Bills and Notes.*

What a sufficient Record—Notice.—The deposit of a mortgage by the mortgagee in the recorder's office for record, the endorsement on it by the clerk, of the date of filing, and the putting of it in the place in the office where unrecorded mortgages are kept for record, are sufficient to affect with notice all who subsequently deal with the property, though the mortgagee do not expressly direct it to be recorded, and the endorsement do not say filed "for record:" *Case* v. *Hargadine*, 43 Ark.

A mortgage is filed within the meaning of the statute when it is delivered to the proper officer, and by him received for the purpose of being recorded; and his neglect to make the proper endorsement upon it, or to record it, will not prejudice the mortgagee: *Id.*

Municipal Corporation.

Power to License Drays—Police Regulation—Taxation.—The power to regulate wagons, drays, &c., conferred by the Municipal Corporations Act of March 9th 1875, includes the power to license as a means of regulating: *Fort Smith* v. *Ayers*, 43 Ark.

A license fee demanded by a municipal corporation for running a dray, when imposed as a mere police regulation and not as a measure

for raising revenue, is not a tax upon an occupation, but a compensation for issuing the license, for keeping the necessary record and for municipal supervision over the business: *Id.*

If a license upon an occupation is so large as to have been manifestly imposed by a city for the sole or main purpose of revenue, it is, in effect, a tax upon the owner or his property, and not within the power conferred by the statute: *Id.*

NEGLIGENCE. See *Master and Servant; Railroad.*

PARTNERSHIP.

Purchase by Partner from Firm.—One partner may acquire title to partnership property by purchasing from the copartnership, and if the purchase is not made with the intent to hinder, delay or defraud the creditors of the copartnership, and the property purchased is such as is exempt from levy and sale on execution under the statutes of the state, may hold it as against creditors of the copartnership: *Burton* v. *Baum*, 32 Kans.

RAILROAD. See *Corporation..*

Damages—Trustees for Bondholders—New Corporation—Liability.—Where trustees of the bondholders are in possession and operating a railroad, under a mortgage for the security of bondholders, they are liable, to the extent of funds received by them in operating the road, to keep the road, buildings and equipments in repair, furnish such new rolling stock as is necessary, pay the running expenses and apply the balance to the payment of any damages arising from misfeasance in the management of the road, and after that to the mortgage, as the rights of the parties may require. A claim for damages to property by fire, communicated by a locomotive while passing along its track at a time when the road was in the possession of and operated by such trustees, does not depend upon proof of malfeasance or negligence, but is an incident to the running of the road, and may be considered a part of the running expenses, and is therefore an equitable lien upon the funds liable in the hands of the trustees: *Stratton* v. *European and North American Railway*, 76 Me.

Where such trustees have paid and conveyed to a new corporation, formed by the bondholders, any such funds upon which there was such a lien to that extent the new corporation would be liable in equity to the person suffering the damage: *Id.*

In such case the bill should contain averments that at the time of the alleged injury and demand for payment, the trustees had in their hands or under their control any such funds, or that they subsequently conveyed any such funds to the new corporation: *Id.*

RECEIVER. See *Corporation.*

REMOVAL OF CAUSES.

Separable Controversy—What is not.—The fact that separate answers were filed which raised separate issues in defending against one cause of action, does not create separate controversies within the meaning of the second clause of Sect. 2, of the Act of March 3d 1875. They simply present different questions to be settled in determining the rights

of the parties in respect to the one cause of action for which suit was brought: *Ayres* v. *Wiswall*, S. C. U. S., Oct. Term 1884.

TAXATION. See *Municipal Corporation.*

TRUSTEES.

Exercise of Judgment—Repairs.—Where a trust deed requires the trustees to care for, manage and keep the trust property according to their "best judgment," it is their discretion which the grantor confided in and not that of the court. If not exercised in good faith the court may interfere, but not otherwise. It is for the trustees to decide whether repairs shall be temporary or permanent: *Veazie* v. *Forsaith*, 76 Me.

TRIAL.

Interpretation of Contract—Submission to Jury.—It is the province of the jury to find what words were used and the meaning of them, where an oral bargain is made. But the court may inform the jury what interpretations of the language used would be possible and permissible, and the jury must determine the meaning within the limits prescribed; *Connor* v. *Giles*, 76 Me.

A judge may withhold a case from the consideration of the jury when there is no evidence upon which they can in any justifiable view find for the party producing it, upon whom the burden of proof is imposed: *Id.*

It is not enough to require submission to a jury, that there may be a crumb or scintilla of evidence. It must be evidence of legal weight: *Id.*

TROVER.

Refusal to Deliver.—An unqualified refusal to deliver goods to an owner upon demand, by one in whose custody they were left by an officer who had taken them without authority, is a ground for an action in trover: *State* v. *Stevenson*, 17 Vroom.

WILL.

Omission of Child.—Under a statute providing that a child unintentionally omitted from a will should take a pro rata share the child is not entitled, if the omission of a child from his father's will is intentional, although the testator would not have entertained such intention but for a mistake as to the legal effect of matters outside of the will: *Hurley* v. *O'Sullivan*, 137 Mass.

WITNESS. See *Expert.*

Reputation—Evidence.—Evidence of the character and present reputation for truth of a witness is admissible to rebut evidence of his conviction of crime: *Gertz* v. *Fitchburg R. R. Co.*, 137 Mass.

Evidence is inadmissible, to rebut evidence of the conviction of a witness of crime, that he was innocent of the crime, and in explanation of his conviction: *Id.*